UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BUD'S WOODFIRE OVEN LLC D/B/A AVA'S PIZZERIA	*	
	*	
Respondent		
and	*	**Case 5-CA-194577**
RALPH D. GROVES, AN INDIVIDUAL		
	*	
Charging Party		
	*	

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RESPONDENT'S LIMITED EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

NOW COMES Respondent, Bud's Woodfire Oven, LLC d/b/a Ava's Pizzeria (the "Respondent" or "Ava's Pizzeria") by, Adam E. Konstas, Leslie R. Stellman, and the law firm PESSIN KATZ LAW, P.A., its undersigned counsel, and respectfully submits these Limited Exceptions to the Administrative Law Judge's (the "ALJ") Decision in the above-captioned action pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the "Board"), and in support thereof states as follows:

1. The Respondent files these Limited Exceptions solely with respect to the ALJ's conclusion of law that the Respondent's "Mandatory Arbitration Agreement" violates Section 8(a)(1) of the National Labor Relations Act (the "Act") as set forth in pp. 9-11 of the ALJ's Decision.
2. While Respondent recognizes the ALJ's analysis with respect to the lawfulness of a mandatory arbitration agreement under Section 8(a)(1) of the Act – namely, whether it could reasonably be construed by employees as prohibiting the filing of unfair labor practice charges with the Board -- the ALJ did not address the question of whether the

Board's deferral principles articulated in *Collyer*[1], *Spielberg*[2], and *Babcock & Wilcox*[3] should apply to an arbitration award under the Respondent's Agreement. ALJ Decision, at 10.

3. In light of the Supreme Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which validated private arbitration agreements even to the point where they waive employees' collective action rights under the Fair Labor Standards Act, and in light of the Supreme Court's earlier decision in *Pyett v. 14 Penn Plaza*, 556 U.S. 247 (2009), which allowed claims under various federal employment discrimination statutes to give way to arbitration agreements which have been applied in order to preclude seeking redress in the courts or before juries for otherwise prohibited discrimination based upon race, age, or gender, *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Respondent urges that the Board's deferral principles apply to the instant arbitration agreement which, as the ALJ recognized, "requires arbitration of 'any and all disputes' arising from the employment relationship, and limits 'any relief or recovery' to the arbitrator's award." ALJ Decision, at 10.

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[1] *Collyer Insulated Wire (Collyer)*, 192 NLRB 837 (1971) (concluding that the Board is "vested with authority to withhold its process" and permitting certain charges to be deferred to an existing contractual grievance procedure culminating in arbitration rather than substituting the Board's own processes).

[2] *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955) (deciding to defer, as a matter of discretion, to an arbitrator's decision in cases where the arbitral proceedings appear to have been fair and regular, all parties agreed to be bound, and the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act).

[3] *Babcock & Wilcox Constr. Co., Inc.*, 361 NLRB 1127 (2014) (retaining the *Spielberg* standard and adding the requirement that the party urging deferral show that the arbitrator was explicitly authorized to decide the unfair labor practice issue (either by the collective bargaining agreement or by the parties themselves) that the arbitrator was presented with and considered the statutory issue, and that Board law reasonably supports the arbitral award).

4. Notably, the ALJ concluded that "it would be futile for an employee to file unfair labor practice charges since the Act's statutory remedies are beyond reach." *Id.* However, the ALJ also noted that the arbitration agreement provides that the "arbitrator shall have the power to award any type of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to attorney's fees and punitive damages when such damages and fees are available under the applicable statute and/or judicial authority." *Id.* at 6. If the Board's deferral principles applied to the instant arbitration agreement, which both parties accepted, there is no reason why a binding arbitration agreement between an employee and an employer – particularly one, such as the instant Agreement, which expressly permits the employee to pursue claims under Section 7 of the Act – cannot preclude obtaining an alternative remedy where full remedies are otherwise available through a timely filed demand for arbitration.

5. Nothing in the Act prohibits the applicability of the *Collyer* doctrine to matters that may be resolved pursuant to legitimate but *private* (as opposed to collectively bargained) arbitration agreements that do not limit the scope of the arbitrator's authority to grant adequate relief for violations of the Act. These Exceptions are intended to suggest that by assuming that an arbitration agreement between an employee and his or her employer which authorizes an arbitrator to award the same (or even more favorable) relief to an employee aggrieved by a violation of the Act is not subject to *Collyer* deferral, the ALJ has erred, particularly given the recent series of Supreme Court decisions validating private arbitration agreements between employees and their employers. The Respondent therefore submits that the ALJ should not have declared the arbitration agreement in this case to be in violation of the Act, but instead, should have recognized the Board's right – indeed,

obligation – to defer the instant dispute and similar disputes to the arbitral process prescribed in that agreement, subject to the Board's *Collyer*, *Spielberg*, and *Babcock & Wilcox* standard of review.

WHEREFORE, for all of these reasons, the Respondent respectfully requests that the Board reject the ALJ's conclusions of law with respect to the Respondent's "Mandatory Arbitration Agreement" as set forth in pp. 9-11 of the ALJ's Decision and find that the Respondent did not violate the Act with the maintenance of its Arbitration Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the Respondent's Limited Exceptions to the ALJ's Decision was served this 29th day of June, 2018, to:

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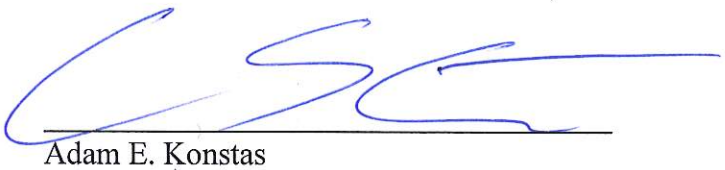

Adam E. Konstas